JD(SF)–44–05
Albuquerque, NM

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

BASIC CONTRACTING SERVICES, INC.

and Case 28-CA-20015

REGINALD ZHUCKKAHOSEE, an Individual

Liza Walker-McBride, Esq.,
of Albuquerque, New Mexico,
for the General Counsel.

Jeffrey L. Lowry, Esq.,
of Albuquerque, New Mexico,
for the Respondent.

DECISION

Statement of the Case

JAMES L. ROSE, Administrative Law Judge: This matter was tried before me at Albuquerque, New Mexico, on April 5 and 6, 2005,[1] upon the General Counsel's complaint which alleges that the Respondent refused to hire Reginald Zhuckkahosee in violation of Sections 8(a)(1), (3) and (4) of the National Labor Relations Act, as amended, 29 U.S.C. §151, *et seq.*

The Respondent generally denied that it committed any violations of the Act and affirmatively contends that its decision not to hire Zhuckkahosee was for good cause and not because of any union or other protected activity he may have engaged in while working for the Respondent's predecessor.

Upon the record as a whole, including my observation of the witnesses, briefs and arguments of counsel, I hereby make the following findings of fact, conclusions of law and recommended order:

[1] All dates are in 2004, unless otherwise indicated.

I. Jurisdiction

The Respondent is a New Mexico corporation engaged in the business of providing security and other services to the United States Government, including the Social Security Administration Albuquerque Teleservice Center in Albuquerque, New Mexico. During the 12-month period ending November 2, 2004, the Respondent has performed security services valued in excess of $50,000 to the United States Government. The Respondent admits, and I conclude, that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), 2(6) and 2(7) of the Act.

II. The Labor Organization Involved

International Guards Union of America, Local No. 131 (herein the Union) is admitted to be, and I find is, a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Facts.

On September 24, the Respondent was awarded a contract with the Social Security Administration (SSA) to provide security services at the SSA Teleservice Center in Albuquerque for the period September 30 to July 31, 2005, which services had previously been performed by Mike Garcia Merchant Security, Inc. In October, the Respondent's owner and president, John Morgan, interviewed applicants for employment, all of whom had previously worked Merchant Security. It is unclear on the record how it was that the Respondent had the contract beginning in September but did not interview or hire employees until October.

Morgan hired eight of the ten former employees of Merchant Security, all of whom were members of the Union, as well as their supervisor, Captain Lance Tise. Morgan determined not to hire Reginald Zhuckkahosee and Nancy Donally. It is the refusal to hire Zhuckkahosse which the General Counsel alleges violated the Act because while working for Merchant Security, Zhuckkahosse had engaged in certain union activity and had filed a charge with the Board in one case,[2] and gave affidavits in that case and another.[3] The General Counsel argues that this activity caused Tise to have animus toward Zhuckkahosse and this animus resulted in Tise recommending to Morgan (but before Tise himself was hired) not to hire Zhuckkahosse. In short, the General Counsel argues that the anti-union animus of Tise can be imputed to Morgan because "the Respondent made Tise its agent even before it hired him." (GC brief at 27)

The record is largely devoted to events occurring in early 2004 and deals with animosity between groups of employees and between certain employees and Tise. For instance in a letter Donally wrote to Mike Garcia on February 2 praising Tise as a "very good manager, " she wrote, "I have never worked in nor witnessed such a hostile work environment where three openly defiant employees, Security Officers Reggie Zhuckkahosee, Security Officer Leticia 'Dora' Castillo, and (Security Officer Eddie Blom when he was here) ban together to constantly threaten their direct supervisor, Captain

[2] Mike Garcia Merchant Security, Case 28-CA-19306.
[3] Mike Garcia Merchant Security, Cases 28-CA-19282 and 28-CA-19283.

Tise, whenever he asks them to do their daily tasks that are within the normal range of their work related duties. He has asked them to stop engaging in inappropriate behavior that not only violates established work rules, but is often times very offensive." And she cites some examples. While this letter may have been at the instigation of Tise, it was nevertheless her take on events at the time and had nothing to do with any union activity.

Then later in 2004, while Merchant Security still had the contract, Donally again wrote to Garcia but this time taking an anti-Tise stance and aligning herself with Zhuckkahosse. This letter concerned an incident between Zhuckkahosee and Frank Novelli on October 8. The case against Merchant Security had been settled and would require Merchant Security to rehire Eddie Blom, in which case Novelli, who was lowest in seniority, he might be discharged. According to Donally this prospect caused Novelli to become angry. He talked to Tise and confronted Zhuckkahosee. She wrote, " This is just another example of how Capt. Tise allows targeted employees (that is Zhuckkahosse) to be retaliated against, mistreated, and abused in the workplace with impunity by various security officers that do his bidding." Zhuckkahosse also wrote Garcia about the incident with Novelli.

Donally claimed to have been sexually harassed by fellow employees and on one occasion not invited to have lunch with the group. She believed this was discriminatory. Regardless of the truth of these allegations, she was considered disruptive by fellow guards, a fact which was reported by them when interviewed by Morgan.

She further testified that when interviewed by Tise and Tenoriao (who was then a sergeant) in December 2003 she was told that there was a problem with three employees whom Tise wanted to get rid of – Zhuckkahosee, Blom and Costello. This statement to Donally predated any of the protected activity engaged in by Zhuckkahosee. Blom testified that when Tise was hired, he made unilateral changes in working conditions and caused disruption. Costello complained to Tise about his allotting hours. She also testified that Tise was angry when he heard that he was attempting to bust the Union and told her he was not anti-union. John Scholl, also a witness called by the General Counsel, testified that Tise's arrival was disruptive.

In short, toward the end of Merchant Security's tenure, there was substantial personal animosity between employees giving credence to the testimony that morale was low. Garcia testified that he had lost confidence with Tise as a manager and in fact wrote a memo to Tise on September 20 stating:

> On this date I called Captain Tise regarding incident reports from Nancy (Donally), Sgt. Tenorio, and some of the other officers.
>
> After a long discussion with him regarding her and the overall Supervision of the job, I told him not reprimand anybody or write any memos to the guards unless he passes them to my manager Mr. Roach, my human resource manager Alfredo Navarro or myself.

Though union grievances and Board cases were involved in some of the incidents, the animosity between groups and between Zhuckkahosse and Tise seems to have little or nothing to do with union membership or the charges. Indeed, according to Donally, Tise's desire to get rid of Zhuckkahosse predated any union activity on his part or the charges. Tise reprimanded Zhuckkahosse for writing in the "gun log" and for

closing and leaving the building prior to the required closing time for the building of 10:15 p.m.

B. Analysis and Concluding Findings

Counsel for the General Counsel correctly states the factors needed to establish a prima facie case of discriminatory refusal to hire. These are, as the Board held in *FES (A Division of Thermo Power),* 331 NLRB 9, 12 (2000): "(1) that the respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants."

Unquestionably the first two factors were established. The Respondent was hiring and Zhuckkahosee clearly was competent to do the work. This case concerns the last factor – that antiunion animus was a contributing factor to Morgan's decision not to hire Zhuckkahosee. Though the cases do not so state explicitly, I believe and conclude that the antiunion animus must be that of the employer, which, by Section 2(2), includes its agents. Counsel for the General Counsel seems to agree, stating on brief (at 23): "Indeed, *Wright Line* is premised on the legal principle that an employer's unlawful motivation must be established as a precondition to finding an 8(a)(3) violation." Antiunion animus of someone not involved in the decision making on behalf of the employer would not satisfy this requirement.

There is no evidence that Morgan harbors any animus against unions in general, or Zhuckkahosse in particular. Morgan has recognized the Union as the representative of the employees involved here and is negotiating with the Union for a collective bargaining agreement. Indeed, seven of the Respondent's other bargaining units are represented by unions. Nor is there evidence that Morgan even knew that Zhuckkahosse engaged in any union activity while working for Merchant Security or participated in any charges against that company before the Board. During his interview Zhuckkahosse mentioned the Board cases and Morgan said he did not want to discuss them, that such was a matter for Merchant Security. I cannot find animus based on this.

Due to this absence of evidence that Morgan's decision not to hire Zhuckkahosse was based on any animus he had, in order to find a violation, unlawful motive must be imputed. To this end, Counsel for the General Counsel argues that Tise had such animus, that Tise was an agent of the Respondent and that Tise made an effective recommendation against hiring Zhuckkahosse.

It is questionable whether the evidence is sufficient to conclude even that Tise had unlawful animus toward Zhuckkahosse, though there was clearly longstanding conflict between them. However, assuming, without deciding, that he did, I cannot conclude that such animus is imputable to Morgan.

The question is whether when interviewed by Morgan, Tise had any kind of authority to act on behalf of the Respondent in connection with the hiring decisions. Under well known rules of common law, agency arises when the principal gives the

agent actual, apparent or implied authority to act on behalf of the principal. *E.g., Nelson Electrical Contracting Corp.,* 332 NLRB 179 (2000).

At the time Tise was interviewed by Morgan, he was an employee of Merchant Security. During this interview, Morgan asked Tise his opinion of the other employees. Tise gave his opinion and when asked by Morgan, followed up with a letter to Morgan stating why Zhuckkahosse and Donally should not be hired. Although Morgan subsequently hired Tise for the captain position (and later discharged him), there is simply no evidence that Morgan "made Tise its agent even before it hired him," as argued by the General Counsel. The cases relied on by Counsel to establish agency are not in point. In *Transportes Hispanos, Inc.*, 332 NLRB 1266 (2000) the Board held:

> We find substantial evidence of an agency relationship before the Respondent formally hired Gilliland. * * * The Respondent's Owner, Henry Gardunio, and General Manager, Carmelo Oliveras, *decided to give Gilliland sole discretion in determining which employees should be hired.* Oliveras informed Gilliland that the Respondent wanted to hire all but four Ryder employees and for her to choose based on a set of general criteria. At a meeting with the Ryder employees, Oliveras distributed job applications and told them to return their completed applications to Gilliland. (Emphasis supplied.)

In *Jim Walter Resources, Inc.,* 324 NLRB 1231 (1997), the Board found that the Charging Party, who had been denied employment with the respondent, had represented his union while working for another company and in doing so "met regularly over grievances with Cowin's management official, Richard Cates, *who subsequently was employed by the Respondent and who was involved in the denial of employment to"* the charging party. (Emphasis supplied.)

In both cases cited by Counsel for the General Counsel, the individual found to be an agent (and whose animus was therefore imputed to the respondent) had either been given the actual authority to make hiring decisions or was at the time of the hiring decision in question a supervisor for the respondent. In *Transportes Hispanos* the individual found to be an agent had in fact been given actual authority to act on behalf of the respondent in the hiring decisions involved. In *Jim Walter Resources* the decision maker relied on a supervisor's negative recommendation. "Under Board and court precedent, the knowledge and animus of a supervisor making a report about an employee on which an employer relies in making an adverse employment decision are imputable to the employer." 324 NLRB at 1232

I have been directed to no case where animus has been imputed or agency found simply because a company official asked a non-employee for an opinion. Morgan asked others for their opinions about the workforce. Indeed, it is common for employers to inquire of third parties about the suitability of job applicants. However, in seeking such opinions an employer does not thereby make the third party an agent. Asking an opinion does not of itself create any kind of authority to act on the employer's behalf, even though, as Morgan testified, he relied in part on Tise's opinion and the opinion of others.

When interviewed by Morgan, Max Sabado said that he was "uncomfortable" working with Zhuckkahosee, whom he thought spied on fellow employees by zooming in

with a security camera. Frank Novelli told Morgan that Zhuckkahosee and Donally were making work difficult and causing bad morale. Novelli was, at the end of the Merchant Security contract, the most junior employee. He has now replaced Tise as the captain.

In lieu of delaying this matter to secure the testimony of an official of SSA, the General Counsel made (and I accepted) an offer of proof to the effect that when asked, the SSA employee told Morgan that Merchant Security had "a good work force." Giving her opinion did not make an agent of the Respondent.

While it is established that the animus of a supervisor or an agent can be imputed to a respondent, here, at the time Tise gave his recommendation and Morgan made his decision Tise did not work for the Respondent. There is no evidence that at the time of Morgan's interview with Tise that Morgan had given Tise any kind of authority to act on the Respondent's behalf. Even though Tise was subsequently hired as a supervisor, that was after the fact. I conclude that whatever animus he may have had cannot be imputed to the Respondent. Finally, the General Counsel does not argue, nor would I find, that Tise's animus was condoned by the Respondent and relates back to the hiring decision.

I do not believe that simply because Zhuckkahosee filed a charge against the Respondent's predecessor and gave affidavits in two cases, or engaged in some union activity while a shop steward for its predecessor, that the Respondent was required to hire him. In addition to the lack of evidence of an unlawful motive on the part of Morgan, there is ample evidence that his refusal to hire Zhuckkahosee was not unreasonable.

Accordingly, I conclude that the General Counsel did not establish by a preponderance of the credible evidence that the Respondent violated the Act as alleged.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [4]

ORDER

The Complaint is dismissed in its entirety.

Dated, San Francisco, California, May 25, 2005.

James L. Rose
Administrative Law Judge

[4]If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.